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No. 00-1519

Supreme Court, U.S.
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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH ARVIZU,

Respondent.

REC'D TEAM 11
AUG 31 2001
UNSCANNED

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is promotion of the proper administration of justice.

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment of the United States Constitution. The Association is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the NAFD's missions is to file *amicus curiae* briefs

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[1] The Parties have consented to the filing of this brief.

Amici curiae state, pursuant to Sup. Ct. R. 37.6, that this brief was not authored in any part by counsel for any party. No person or entity, other than *amici* and their counsel, made a monetary contribution to the submission of this brief.

to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

STATEMENT OF THE CASE

Amici curiae rely on the Statement of the Case submitted by Respondent Ralph Arvizu.

SUMMARY OF ARGUMENT

1. As articulated by this Court, the totality of the circumstances test that governs reasonable suspicion determinations is conducted by weighing the individual facts of a case against an objective legal standard as a means of preserving Fourth Amendment constitutional values. Although it is a fact-specific inquiry, through precedent, it is intended that courts will establish the parameters of what supports a reasonable suspicion. Indeed, courts, particularly appellate courts, contribute to the analysis consistent with their core function of developing the constitutional common law; particularly in the context of the Fourth Amendment, federal courts play a crucial role in defining the contours of constitutional protections. The definition is critical, as this Court has recognized the need to curb unfettered discretion on the part of law enforcement as a means of ensuring individuals' freedom from arbitrary intrusion by the police. Here, the Court of Appeals' decision appropriately and necessarily contributes to the evolution of the law by establishing that, in particular circumstances, certain factors do not in fact contribute to a finding of reasonable

suspicion. Through the articulation of these guidelines, the Court of Appeals furthers the development of a necessary constitutional backstop to police searches and seizures.

2. Its appropriate holding of law as applied to these facts notwithstanding, the Court of Appeals' opinion is an unremarkable application of *de novo* review to the facts of this case. The court's consideration of each of the facts at issue was based on its experience with these types of cases, as applied to a particular set of facts. Under these circumstances, the Court of Appeals properly determined that the factors alleged to give rise to a reasonable suspicion did not, in fact, raise such a suspicion and, under the Fourth Amendment, a stop and search based upon these particular facts was unwarranted and unconstitutional.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY FULFILLED ITS FUNCTION OF DEFINING THE PARAMETERS OF THE TOTALITY OF THE CIRCUMSTANCE TEST THAT GOVERNS REASONABLE SUSPICION INQUIRIES UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In the decision below, the Court of Appeals undertook to provide lower courts and law enforcement officers with guidance as to what factors may and may not be given weight in determining whether there is reasonable suspicion of criminal wrongdoing, sufficient to permit an investigative stop of an automobile. *United States v.*

Arvizu, 232 F.3d 1241, 1248 (9th Cir. 2000). The Government portrays the Court of Appeals' decision as incorporating "methodological errors" that pose a fundamental threat to established Fourth Amendment law and this nation's ability to control its borders. *Brief of United States* at 31 (hereinafter "*Pet.'s Br.*"). In the Government's view, any attempt to rationalize this exhaustively litigated area of the law is impermissible, because it conflicts with the "totality of the circumstances test" that governs determinations of reasonable suspicion. *Pet.'s Br.* at 20-21. In fact, however, a court may, in certain circumstances, extract principles of general application from well-established case law and experience, without violating the totality of the circumstances approach. Moreover, in *Ornelas v. United States*, 517 U.S. 690 (1996), this Court called upon appellate courts to develop such principles through searching *de novo* review of reasonable suspicion determinations. Indeed, the development of such principles is both inherent in the notion of case law and critical to the development of Federal Constitutional standards. The holding sought by the Government would hamper the Courts of Appeals from articulating workable standards in this troubled area of search and seizure law through the case-by-case process of common law development, which has always characterized our constitutional jurisprudence.

Amici agree, of course, that the existence of reasonable suspicion depends upon the totality of the circumstances. That determination is conducted by weighing the individual facts of a case against the legal standard established as a means of preserving core Fourth Amendment constitutional values: an investigatory stop by the police,

including a stop of a vehicle, is permissible under the Fourth Amendment only where the law enforcement officer has "a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.' " *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Such a stop "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981). In making this determination, the court must consider " 'the totality of the circumstances – the whole picture.' " *Sokolow*, 490 U.S. at 8 (quoting *Cortez*, 449 U.S. at 417).

The legal issue before this Court, as presented by the Government, focuses not upon the result reached by the Court of Appeals, but upon the court's alleged "methodological errors" in conducting its Fourth Amendment analysis. *Pet.'s Br.* at 31. That is, the Government faults the Court of Appeals because it sought to "delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here." *Pet.'s Br.* at 21 (quoting *Arvizu*, 232 F.3d at 1248). In the Government's view, *any* attempt to define and describe which factors may be considered by law enforcement officers in making investigatory stops is simply impermissible under this Court's totality of the circumstances test. *Pet.'s Br.* at 20-21. Rather, according to the Government, a reviewing court must start with a clean slate in every case, and simply "weigh" the totality of the circumstances. Apparently, then, no factor can be ruled out; if a law enforcement officer noticed or referred to a factor, it must be weighed in the analysis. Therefore, according to the Government's argument, any attempt to

synthesize the case law by declaring certain factors to be usually or wholly irrelevant, based on reason and experience, runs afoul of this Court's insistence that the totality of the circumstances must be considered in every case.

In so urging, the Government makes an extreme argument that, in effect, courts have *no* role in defining what circumstances are relevant to a finding of reasonable suspicion. That extraordinary contention undermines a core function of the courts – establishing the contours of constitutional protections through the development of the law and establishment of precedent. It also misconstrues this Court's prior decisions and endangers courts' ability to ensure individuals the protection of the Fourth Amendment. In fact, wholly consistent with its role, the Court of Appeals here appropriately applied the relevant analysis in a way that contributes to the judicial development of Fourth Amendment law and, consequently, positively advances the understanding of reasonable suspicion. Should the Government's position prevail, law enforcement officers would be deprived of established norms to assist them in reasonable suspicion determinations, and citizens would never know what behavior might subject them to intrusions on their privacy.

There is, moreover, no clash between the totality of the circumstances test and the notion that courts may make judgments as to what circumstances are relevant to the implementation of such a test. Rather, it is the Government's position that directly clashes with this Court's holdings as to the proper role of appellate courts in this area. This Court has decreed that appellate review of reasonable suspicion determinations should "unify precedent and . . . provid[e] law enforcement officers with a

defined 'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.' " *Ornelas*, 517 U.S. at 697-98 (quoting *New York v. Belton*, 453 U.S. 454, 458 (1981) and citing *Thompson v. Keohane*, 516 U.S. 99, 115 (1995)). In *Ornelas*, this Court held that appellate courts must exercise *de novo* review over lower courts' determinations of reasonable suspicion and probable cause in order to develop just such "rules." Even where one case may not directly and squarely control another, the Court wrote, "the two decisions when viewed together may usefully add to the body of law on the subject." *Ornelas*, 517 U.S. at 698. The very fact-specificity of the issue, when subjected to searching appellate review, can and does produce useful principles of general application. Indeed, as the Government itself recognizes, courts in the Ninth Circuit are faced with a myriad of cases involving the Border Patrol: two thirds of the Border Patrol's apprehensions occurred within the Ninth Circuit, and the southern edge of the circuit contains the busiest border crossing in the world. *Petition for a Writ of Certiorari* at 21. Such a high volume of Border Patrol cases yields similar fact patterns, underscoring the need for and ability of appellate courts in that circuit to establish guiding principles and thereby to assist law enforcement and lower courts in the fair and efficient adjudication of these matters.

Further, although the totality of the circumstances test aims to establish a "practical and nontechnical" standard, *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Bringar v. United States*, 338 U.S. 160, 176 (1949)), it is not,

as a result, devoid of meaning. Absent judicial interpretation and oversight, however, it may become standardless. True, the totality of the circumstances approach, announced by the Court in *Gates*, can not be readily "reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. That does not imply, however, that *no* standards are possible. Because the analysis requires an "objective justification" for a stop, such that the law enforcement officer must be able to "articulate more than an 'inchoate and unparticularized suspicion or 'hunch' ' " of criminal activity, *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (quoting *Terry*, 392 U.S. at 27), courts must flesh out what amounts to a reasonable justification in order to establish the constitutional backstop for investigatory stops. Particularly in the context of border area stops, "the reasonableness requirement of the Fourth Amendment demands something more than [ ] broad and unlimited discretion." *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975).

Indeed, courts flesh out the meaning of the totality of the circumstances analysis consistent with their function of interpreting the constitution and with our common law tradition; the fundamental method of American jurisprudence is predicated on the gradual development of law, including constitutional law, by establishing precedent to guide other courts, lawyers, citizens and law enforcement facing similar or analogous situations. By applying a set of facts to establish holdings, courts, and particularly appellate courts, contribute to the incremental evolution of the law in an orderly and stable fashion. As this Court recently recognized, "[n]o court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of

modifications represented by [ ] cases are as much a normal part of constitutional law as the original decision." *Dickerson v. United States*, 530 U.S. 428, 441 (2000). This method of developing the law is the very nature and virtue of our common law: "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law . . . we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms." *Funk v. United States*, 290 U.S. 371, 382-83 (1933) (quoting *Hurtado v. California*, 110 U.S. 516, 530 (1884)). And, once the law is established, these holdings are subject to wider applicability. This Court has often cited Justice Cardozo's reminder that: "The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." Benjamin Cardozo, *The Nature of the Judicial Process* 149 (1921). *See, e.g., Hubbard v. United States*, 514 U.S. 695, 711 (1995); *Runyon v. McCrary*, 427 U.S. 160, 190-91 (1976) (Stevens, J., concurring). It is axiomatic that "no judicial system could do society's work if it eyed each issue afresh in every case that raised it. . . . [T]he very concept of the rule of law underlying our own Constitution requires such continuity over time." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992).

The Government, however, seeks to impair this core judicial function, arguing that the courts' ability to provide guidance to other courts and to law enforcement by establishing the parameters of "reasonable suspicion"

and creating precedent in this area is "unequivocally foreclosed" by the totality of the circumstances test. *Pet.'s Br.* at 21. To the contrary, by announcing that, in certain circumstances, certain factors have no weight in the reasonable suspicion analysis, the Court of Appeals contributes to the deliberative process of developing Fourth Amendment jurisprudence, applying its extensive experience with these types of cases to assist in creating clarity and consistency on the issue and providing needed guidance for law enforcement and the lower courts in this area. Recognizing that multi-factor, fact-specific tests introduce "a troubling degree of uncertainty and unpredictability into the process," *Arvizu*, 232 F.3d at 1248, the Court of Appeals here simply established precedent with respect to the facts at issue in "the stop involved here," *id.*, as is its province and its duty.

The Government's implication that courts can play no role in refining the totality of the circumstances analysis not only undermines the very foundations of our legal tradition, but is particularly dangerous in this Fourth Amendment context. In the realm of the Fourth Amendment, courts serve the critical function of constitutional interpretation, as "the legal rules for probable cause and reasonable suspicion acquire content only through application," and appellate courts are especially needed "to maintain control of, and to clarify, the legal principles." *Ornelas*, 517 U.S. at 697 (citing *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). *See also Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. ___, 121 S. Ct. 1678, 1685 (2001) (citing *Ornelas* with approval). Without courts being able to articulate the parameters of the standard against which law enforcement officers can measure

the reasonableness of their suspicion, "the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police." *Terry*, 392 U.S. at 22 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)). *See also Keohane*, 516 U.S. at 115 ("the law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law"). This would undermine a central concern of Fourth Amendment jurisprudence. *See Payton v. New York*, 445 U.S. 573, 583-85 (1980). As this Court has stated, "The essential purpose of the proscriptions of the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, in order to safeguard the privacy and security of individuals against arbitrary invasions." *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (internal quotations omitted).[2]

The Government's warning that courts can play no law-making function in this context because to do so would somehow confuse or frustrate law enforcement efforts, *Pet.'s Br.* at 23-24, similarly carries no weight. Elucidating the contours of constitutional rights is precisely the courts' function, and this Court accordingly does not shrink from establishing rules regarding law

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[2] *See also United States v. Montero-Camargo*, 208 F.3d 1122, 1143 (9th Cir.), *cert. denied, Sanchez-Guillen v. United States*, 531 U.S. 889 (2000) (Kozinski, concurring) ("to rely on every cop's repertoire of war stories to determine what is a 'high crime area' – and on that basis to treat otherwise innocuous behavior as grounds for reasonable suspicion – strikes me as an invitation to trouble").

enforcement's role and authority in the Fourth Amendment context, trusting that the police will be able to "recall and apply," *Pet.'s Br.* at 23, these rules.[3] In fact, a review of this Court's most recent Fourth Amendment decisions confirms that courts are expected to refine the various tests and analyses that have been created over the years to effectuate Fourth Amendment protections, and law enforcement is expected to comply.

For example, in *Kyllo v. United States*, 533 U.S. ___, 121 S. Ct. 2038 (2001), the Court grafted a fact-specific requirement onto an already established Fourth Amendment rule to give further meaning and content to that rule. Specifically, the Court examined when a warrantless search of a home is considered reasonable: "[w]here, as here, the Government uses a device that is not in the general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 2046. The Court noted that, with this new rule, it was supplementing the time-worn analysis set forth in *Katz v. United*

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[3] The Government's suggestion that the police need no rules or guidelines in this area is counterintuitive and wrong. This Court consistently develops rules, even bright-line rules, to assist law enforcement in doing its job. For example, this Court recently affirmed the constitutional basis for the requirement, set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), that four specific warnings must be given before a suspect's statement made in the course of custodial interrogation may be admitted into evidence. *Dickerson v. United States*, 530 U.S. 428 (2000). These "concrete constitutional guidelines" are necessary to protect against coercion inherent in custodial police interrogation. *Id.* at 435 (quoting *Miranda*, 384 U.S. at 442).

States, 389 U.S. 347 (1967), regarding when an individual has a subjective expectation of privacy that society is "prepared to accept as reasonable." *Id.* at 2043. The Court noted that the new standard was limited to a particular set of circumstances: "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area . . . constitutes a search – at least where (as here) the technology in question is not in public use." *Id.* at 2043 (quotation omitted). Indeed, both the majority and the dissent recognized that the Court was setting forth a new requirement as a means of clarifying when, in light of new technology, the Fourth Amendment test set forth in *Katz* had been met. *Id.* at 2044; *Id.* at 2050 (Stevens, J., dissenting) ("the Court has fashioned a rule that is intended to provide essential guidance for the day when 'more sophisticated systems' gain the 'ability to see through walls and other opaque barriers' "). Nor did any difficulty that law-enforcement may have in complying with additional elements of an established Fourth Amendment rule preclude the Court from imposing this additional requirement on the assessment of "reasonable expectation of privacy." *See also Bond v. United States*, 529 U.S. 334, 338-39 (2000) (holding that law enforcement's manipulation of a bag in an overhead bin on a bus violates a passenger's reasonable expectation of privacy).

Similarly, in its effort to "describe and delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved [in this case]," *Arvizu*, 232 F.3d at 1248, the

Court of Appeals endeavored to create Fourth Amendment limits on law enforcement's authority. In so doing, the court appropriately found that there are some factors which do not give rise to the suspicion necessary to pass muster under this analysis. Thus, to the extent that the Court of Appeals established, as a matter of law, whether certain facts in a given circumstance may be considered relevant to the totality of the circumstances determination, the court was acting consistent with the purpose of judicial review in this area: to develop Fourth Amendment law and protect individuals from "arbitrary interference by law officers." *Brignoni-Ponce*, 422 U.S. at 877.

The Court of Appeals discounted several factors, some of them seemingly on grounds of mere irrelevance or triviality. But the value of the Court of Appeals' approach is perhaps best demonstrated by its rejection of a factor that is potentially pernicious, in addition to being irrelevant: the neighborhood to which Respondent's vehicle was registered. The Court of Appeals considered the fact that the vehicle was registered to an address on a block notorious for smuggling and found that, under the circumstances of this case, this fact was of "no significance and may not be given any weight." *Arvizu*, 232 F.3d at 1250. In so ruling, the court stated that "one's place of residence is simply not relevant to a determination of reasonable suspicion." *Id.*[4] The court noted that, while an

[4] While ruling that this fact was, as a matter of law, irrelevant to the reasonable suspicion analysis, the court also contextualized the factor, distinguishing the fact that Respondent's vehicle was simply registered to an address in a "high crime area" from a situation in which there were unique circumstances attendant to the "high crime area," such as the

individual's presence in a high crime area may, in certain circumstances, give rise to a reasonable suspicion, "where a person lives is an entirely different matter." *Id.* Indeed, this is precisely the type of factor that, absent some constitutional backstop and judicial determination of relevance, may be used to justify a myriad of police activities that are unwarranted and likely to be used as pretext for an unconstitutional search and seizure. As the Court of Appeals recognized, if such a factor were permitted to justify reasonable suspicion, "persons forced to reside in high crime areas for economic reasons (who are frequently members of minority groups) would be compelled to assume a greater risk not only of becoming victims of crimes but also of being victimized by the state's efforts to prevent those crimes – because their constitutional protections against unreasonable intrusions would be significantly reduced." *Id.*

Indeed, while the Government goes to great lengths not to condone intentional discrimination, *Pet.'s Br.* at 29-31, in fact, by logical extension, its argument would allow just that. It is well known that race is often used as a proxy for criminality and a determining factor to arrest, stop or frisk an individual. *See, e.g.*, David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. Pa. J. Const. L. 296, 299-306 (2001); David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265, 265-288 (1999); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth*

fact that the area was isolated and uninhabited and thus not used for any legitimate purpose. *Arvizu*, 232 F.3d at 1250, n.10.

Amendment, 74 N.Y.U. L. Rev. 956, 957-58, nn.1-3 (1999); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 Colum. Hum. Rts. L. Rev. 551, 558-66 (1997). A pernicious practice that seeps into law enforcement determinations via a host of pretextual justifications, racial profiling nonetheless can be curbed by stemming law enforcement officers' ability to rely upon factors that have no probative value or relevance to a reasonable suspicion determination. In this way, the court positively contributes to the evolution of a constitutional standard by which law enforcement knows that it must abide when making reasonable suspicion determinations. The court's efforts to stem at least one such factor should, therefore, be applauded.

Accordingly, the Court of Appeals' decision is an appropriate contribution to Fourth Amendment jurisprudence, and *amici curiae* respectfully urge that this Court uphold the appellate courts' law-making function in this area.

II. THE COURT OF APPEALS' OPINION IS THE UNREMARKABLE APPLICATION OF *DE NOVO* REVIEW TO THE FACTS OF THIS CASE.

The decision of the U.S. Court of Appeals for the Ninth Circuit was a fairly routine application of established case law to a familiar fact pattern. *Amici* respectfully suggest that a judgment that these ten factors did not collectively constitute reasonable suspicion of criminal activity would ordinarily be neither controversial nor worthy of this Court's attention. Nothing about the Court

of Appeals' decision justifies the sweeping and unnecessary intervention into the court's decision-making methodology that the Government seeks.

The constitutional backdrop for the Court of Appeals' decision, specifically the totality of the circumstances reasonable suspicion analysis, is well established. *See Sokolow*, 490 U.S. at 7-8; *Cortez*, 449 U.S. at 417. It is well established, too, that the Court of Appeals exercises *de novo* review over the District Court's determination as to reasonable suspicion. *Ornelas*, 517 U.S. at 699.

Here, the Court of Appeals issued a decision which is, simply, an unremarkable *de novo* application of the totality of the circumstances reasonable suspicion test to the facts before it. Specifically, in holding that the facts did not give rise to reasonable suspicion, the Court carefully assessed the relevance of the individual factors in light of the circumstances and context of the case at hand, and determined that certain of those factors had no weight. The court explicitly stated that "some of the factors on which the district court relied are neither relevant nor appropriate to a reasonable suspicion analysis *in this case*, and that the others, singly and collectively, are insufficient to give rise to reasonable suspicion." *Arvizu*, 232 F.3d at 1248 (emphasis added).

The court's consideration of each of the factors at issue was based on its experience with these types of cases and made in the context of this particular set of facts. For example, in considering the factor of Respondent's failure to slow his minivan as it approached the Border Patrol vehicle, the Court of Appeals determined that under the facts of this case, which included the fact

that the officer in question never claimed that Respondent broke any traffic laws or that Respondent drove erratically or evasively, there was no objectively reasonable basis for finding that this factor indicated criminal activity. *Arvizu*, 232 F.3d at 1249. Likewise, in considering the factor of Respondent's failure to acknowledge the law enforcement official, the court determined that there were present no "special circumstances" which would indicate that criminal activity was afoot, and thus, given the facts of this case, this fact, too, failed to support a reasonable suspicion determination. *Id.* at 1249. The additional factors that the court rejected – namely the fact that another minivan, stopped in the past month on the same road, contained marijuana, the fact that the officer did not recognize Respondent's minivan as belonging to a local resident, the fact that Respondent's minivan was registered to an address on a block notorious for smuggling, and the fact that Respondent's children's knees were raised in the back seat – were likewise considered "under the circumstances" to have little or no weight in the reasonable suspicion determination. *Id.* at 1249.

Accordingly, given the circumstances of this case and based on its expertise with these types of cases, the Court of Appeals determined that the factors alleged to give rise to reasonable suspicion did not, in fact, raise such a suspicion and, under the Fourth Amendment, a stop and search based upon those facts was unwarranted and unconstitutional. The court reached its determination through a straightforward application of the totality of the circumstances reasonable suspicion test to the facts of this case, as an appellate court is charged with doing. *Ornelas*, 517 U.S. at 699. Because such an analysis is well

within the province of the reviewing court, and because any restrictions on a court's ability to conduct such an analysis would undercut the established role of appeliate courts in the Fourth Amendment context, *amici curiae* respectfully urge that the Court affirm the judgment of the Court of Appeals.

CONCLUSION

For the foregoing reasons, *amici curiae* National Association of Criminal Defense Lawyers and National Association of Federal Defenders respectfully urge the Court to affirm the ruling below.

Respectfully submitted,

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